

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BETTY TAYLOR**

Claimant

VS.

**CENTRAL KANSAS MEDICAL CENTER**

Respondent

AND

**INDEMNITY INSURANCE CO. OF NORTH AMERICA)**

Insurance Carrier

Docket No. 1,047,435

**ORDER**

Claimant requested review of the November 8, 2011 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on March 16, 2012, in Wichita, Kansas.

**APPEARANCES**

Melinda G. Young, of Hutchinson, Kansas, appeared for the claimant. L. Anne Wickliffe, of Kansas City, Missouri, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill has recused himself from this appeal. Accordingly, E.L. Lee Kinch, of Wichita, Kansas, has been appointed as a Board Member Pro Tem in this case.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found that claimant suffered personal injury by accident, arising out of and in the course of her employment with respondent and concluded claimant suffered a 50 percent permanent partial general disability, based upon a 100 percent wage loss, inclusive of a 3 percent functional impairment. The ALJ ruled that claimant failed to prove a task loss in this matter. Respondent was directed to reimburse claimant's travel expenses for the return trip to Kansas for Dr. Do's Independent Medical Examination (IME).

Claimant argues that the Board should reverse the ALJ's Award to find that she does indeed have a task loss of 59.25 (an average of Dr. Murati and Dr. Do's opinion) combined with her 100 percent wage loss for a 79.63 percent permanent partial general (work) disability. Claimant contends that there was no medical evidence of any pre-existing injury or work restrictions offered or admitted into evidence to prove any apportionment for a pre-existing condition or to justify a reduction or elimination of claimant's task loss.

Respondent contends that claimant has failed to meet her burden of proof to establish a compensable task loss. Therefore she is not entitled to an award of work disability benefit that includes a task loss.

#### **FINDINGS OF FACT**

Claimant began working for respondent as a CNA in October 2007 or 2008. She claims injury to her low back on June 8, 2009. Claimant testified that immediately after she started her shift on June 8th, one of the patients fell in his room. Claimant and other employees went to see if he was alright and helped him back into his bed. As a result of this activity claimant developed a cramp and then pain in her low back that went into her hips. She also experienced sciatic nerve pain.

Claimant reported her pain to respondent and was provided with physical therapy. She testified that now she can walk no more than a block and half without pain. And the pain occurs everyday and she has to use other parts of her body to compensate and move around. The last time claimant had physical therapy treatment was in June or July 2008.

Claimant admits that she was in a motor vehicle accident in 1989 or 1990 when she was rear-ended. She received chiropractic treatment for her neck and back and was able to return to work a while afterwards. Claimant had been working at Bank of America in San Francisco at the time of this accident.

Claimant also suffered an injury to her back in 1994 after attempting to help an amputee with Alzheimer's from a wheelchair to a shower chair, experiencing pain in her back bad enough that she could barely walk. She was sent for physical therapy and then was fine.

She also suffered a back injury in April or May 2008 while working as a home health aide. She received physical therapy and returned to work.

Claimant last worked for respondent on June 18, 2009, ten days after her injury. Claimant's employment with respondent was terminated June 22, 2009, due to a verbal confrontation with a resident. She testified that she was told she was terminated for unprofessionalism, and that respondent told unemployment that she was terminated for absenteeism. Both of which she denied. Claimant believes that she was terminated because of her age and her injury.

Claimant has not worked since she was terminated. She moved to Elk Grove, California to live with her son because she had nowhere else to go. Claimant had to fly back to Kansas for her appointment with Dr. Do and Steve Benjamin. Respondent paid for some of her travel expenses. Claimant now lives alone in a low income building for seniors aged 55 and up. Claimant has been receiving social security disability since December 2010.

Claimant is on heart medication, Zoloft and Neurontin. Claimant had a pacemaker implanted in June 2010 by Dr. Preston. Claimant also suffers from Fibromyalgia, problems with her sciatic nerve, COPD, Hepatitis C, and Diabetes.

Claimant was given a lifting restriction of 20 pounds by the Central Kansas Medical Center in June 2009. She was given restrictions of no lifting more than 30 to 40 pounds in May 2010, after suffering a low back injury while working at ResCare Pathways. Claimant testified that no doctor has told her that she can't currently return to work, but she claims her restrictions make it impossible for her to find work.<sup>1</sup>

At the request of her attorney, claimant met with Dr. Pedro Murati, for an examination on March 2, 2010. She had complaints of constant low back pain, inability to do yard work, shovel snow or clean, and inability to sit or stand for long periods without pain.

Dr. Murati examined claimant and opined that she had low back pain with signs and symptoms of radiculopathy and bilateral SI joint dysfunction. Dr. Murati opined that these diagnoses were within reasonable medical probability a direct result of the work-related injury on June 9, 2009. Dr. Murati did not talk with the claimant about her chronic medical conditions.

Dr. Murati imposed the following permanent restrictions: no crawling, no lifting, carrying, pushing or pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds, rarely bend, crouch or stoop, occasionally sit, squat, drive or climb stairs or ladders, frequently stand or walk, alternate sitting, standing and walking.<sup>2</sup> He recommended treatment for the low back including a bilateral lower extremity NCS/EMG to include the lumbar paraspinals, medication and a series of lumbar epidural steroid injections. If these failed then a surgical evaluation was recommended. For the bilateral SI joint dysfunction, cortisone injections and physical therapy were recommended with use of an SI belt and/or gait training and medication as needed. He assigned a 10 percent whole person impairment to claimant's low back under Lumbosacral DRE III of the 4th

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<sup>1</sup> Claimant's Depo. (Aug. 5, 2011) at 42.

<sup>2</sup> Murati Depo., Ex. 2 at 4 (Release to Return to Work dated Mar. 2, 2010).

edition of the *AMA Guides*.<sup>3</sup> Dr. Murati reviewed the task list of Robert Barnett, Ph.D. and opined that under her restrictions, claimant could not perform 26 out of 32 tasks for an 81 percent task loss.<sup>4</sup>

Claimant failed to disclose to Dr. Murati that she had received treatment for the 2008 work injury. She also failed to disclose that she was under work restrictions from the 2008 injury when she began working for respondent. She also failed to tell the doctor that she had been diagnosed with Fibromyalgia.

At respondent's request, claimant met with Dr. John Estivo for an examination, on July 16, 2010. Claimant's complaints included pain in the lumbar spine and into the left buttocks. Claimant reported that this pain comes and goes every few days. Dr. Estivo reported that claimant appeared to be very comfortable at the time of his visit with her.<sup>5</sup>

Dr. Estivo ordered x-rays and an MRI, neither of which revealed acute abnormalities. Claimant did display degenerative disk disease at L4-L5 and L5-S1 with mild bulges.<sup>6</sup>

Dr. Estivo opined that claimant suffered a temporary aggravation of her pre-existing degenerative disk disease with a lumbar spine strain. Dr. Estivo noted in his report that claimant suffered from chronic lumbar spine pain for many years and that it pre-existed her June 8, 2009 injury. He found claimant to have a 0 percent impairment as the result of the June 8, 2009 injury. He did not feel that she was in need of any further medical treatment or restrictions.

Dr. Estivo reviewed the task lists of Robert Barnett, Ph.D. and Steve Benjamin and opined that there were no tasks that claimant could not perform.<sup>7</sup>

Claimant met with Dr. Pat Do for a court ordered IME on April 7, 2011. Dr. Do noted that claimant injured her low back on June 8, 2009 while lifting a patient off the floor and underwent physical therapy. Dr. Do was aware that claimant could not have epidural injections due to a bad reaction to cortisone. Also claimant could not have another MRI because she had a pacemaker.

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<sup>3</sup> *Id.*, Ex. 2 at 3 (Murati's Mar. 2, 2010 IME report).

<sup>4</sup> *Id.*, Ex. 3 (Task List).

<sup>5</sup> Estivo Depo., Ex. 2 at 3 (Dr. Estivo's July 16, 2010 IME report).

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*, Ex. 3 (Aug. 2, 2011 letter).

Dr. Do diagnosed claimant with low back pain, mostly myofascial, with some underlying degenerative joint disease. He determined causation to be connected to claimant's prior work injury or the car accident, but agreed that trying to lift a patient can cause back strain.<sup>8</sup>

Dr. Do found claimant to be at maximum medical improvement and assigned a 5 percent whole person impairment under DRE Category II Lumbosacral of the 4th edition of the *AMA Guides*. He recommended restrictions of continuously lift 0-20 pounds, frequently lift 21-50 pounds, no lifting greater than 51 pounds, continuously push or pull 0-50 pounds, frequently 51 to 75 pounds, and no pushing or pulling greater than 76 pounds.<sup>9</sup> Dr. Do's restrictions are less severe than the previous restrictions imposed on the claimant.

On June 2, 2011, Dr. Do issued a letter stating 2 percent of his whole person impairment rating for the claimant was attributed to her previous injury and the other 3 percent was the result of the June 8, 2009 injury.<sup>10</sup>

Dr. Do reviewed the task list of Robert Barnett, Ph.D. and opined that under her restrictions, claimant could not perform 12 out of 32 tasks for a 37.5 percent task loss.<sup>11</sup> However, he attributed the total of claimant's task loss to claimant's chronic pre-existing problems. He attributed no task loss to the June 8, 2009 accident.

At respondent's request, vocational expert Steve Benjamin conducted a vocational assessment of claimant on April 7, 2011. In his report dated April 22, 2011, he determined that because claimant was not working at the time, her wage loss was 100 percent. He opined that in his professional opinion claimant, under the restrictions of Drs. Do and Razafindrabe, should be able to reenter the open labor market in the health field as a companion/home attendant as that job would generally not provide hands on medical care for patients. However, the job does allow for light cleaning and cooking, and taking the patient to and from appointments. He opined that claimant could make at least \$459.60 a week in her local area in California and at least \$336.00 a week in her local area in Kansas.

He also opined that under the restrictions of Dr. Estivo claimant should be able to work. She would be able to return to a similar position earning a comparable wage in her local area in California and in her area in Kansas.

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<sup>8</sup> Do Depo., Ex. 2 at 2-3 (Dr. Do's Apr. 7, 2011 IME report).

<sup>9</sup> *Id.*, Ex. 2 at 3 (Dr. Do's Apr. 7, 2011 IME report).

<sup>10</sup> *Id.*, Ex. 3 (June 2, 2011 letter).

<sup>11</sup> *Id.*, Ex. 6 (Task List).

At her attorney's request, claimant conferred by phone with Robert Barnett, Ph.D. for a vocational assessment on November 1, 2010. Dr. Barrett identified 32 tasks for the claimant and opined that claimant could earn \$380 per week without fringe benefits.

Dr. Barrett opined that under Dr. Murati's restrictions, claimant would have a 81 percent task loss and combined with her 100 percent wage loss at the time of the assessment a 90 percent work disability.

Dr. Barrett acknowledged that claimant did not inform him that she had work restrictions when she began her job with respondent. And since he is not a medical doctor he doesn't review any medical reports and was not aware of any prior injuries claimant had to her back. Dr. Barnett testified the only thing he asked claimant about in his assessment was whether or not she was taking any pain or psychiatric medications.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>12</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>13</sup>

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.<sup>14</sup>

The task loss opinions contained in this record are nearly diametrical. Dr. Murati determined that claimant had suffered an 81 percent task loss. Dr. Estivo found that claimant had suffered no task loss from the accident on June 8, 2009. Dr. Do, the court

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<sup>12</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>13</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>14</sup> K.S.A. 44-510e.

appointed IME doctor determined that claimant had suffered a task loss of 37.5 percent. However, he attributed the entire task loss to claimant's pre-existing condition. The opinion of Dr. Murati is tainted by the fact claimant failed to fully inform him of her pre-existing limitations, injuries and restrictions. The ALJ found the opinion of Dr. Do, the court appointed IME doctor to be the most credible. The Board agrees and adopts his opinion that claimant suffered no task loss as the result of this accident. The award of the ALJ is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that she suffered a task loss as the result of the accident on June 6, 2009.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 8, 2011, is affirmed.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
L. Anne Wickliffe, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge